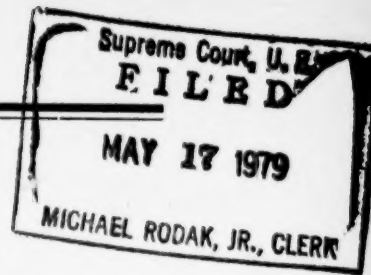


No. 78-1610



**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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Liane Buix McDonald, on her own behalf and on behalf of the class in this case, files the following in opposition to the petition for writ of certiorari.

OPINIONS BELOW

No opinion was issued by the district court. The unanimous opinion of the court of appeals (Pet.App. A3-A10) is reported at 587 F.2d 357.

JURISDICTION

The petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on November 21, 1978, and rehearing was denied on January 25, 1979. The petition for writ of certiorari was timely filed within 90 days thereafter, on April 20, 1979.

QUESTIONS PRESENTED

1. Should certiorari be granted to review the decision of the court of appeals about the temporal limits of the class in this employment discrimination case, when the decision below does no more than apply settled principles concerning the tolling effect for the class of EEOC charges filed by a class member co-plaintiff?

2. Did the court of appeals err in reaffirming what it had held two years before, in a decision affirmed by this Court, 432 U.S. 385 (1977), that *inter alia* the class must include all women injured by petitioner's concededly unlawful employment practice?

STATEMENT

Prior to November 7, 1968, petitioner United Air Lines required its female flight attendants, in contrast to its male flight attendants, to resign upon marriage or be discharged. This case was brought in 1970 as a class action to gain relief for those women who had been injured by this concededly unlawful employment practice under Title VII of the Civil Rights Act of 1964.¹

¹ Petitioner abandoned its affirmative defense that being unmarried is a "bona fide occupational qualification reasonably necessary to the position of stewardess," originally asserted in its answer to the complaint.

In 1972, on United's motion to strike the class action allegations of the complaint, the district court held that the prospective class in this case could only include women who had resigned or been terminated because of marriage and who had then "protested" the no-marriage rule by filing a union grievance or by filing individual discrimination charges with the Equal Employment Opportunity Commission or a comparable state agency. *Romasanta v. United Air Lines, Inc.*, 6 FEP Cases 156 (N.D. Ill. 1972). Thus defined, the class was viewed by the district court as being of insufficient numerosity to satisfy the requirement of Federal Rule of Civil Procedure 23(a). *Id.* at 159. However, it indicated it would permit intervention to all who had resigned or were terminated and who had protested. *Id.*

The original plaintiffs sought interlocutory review of the adverse class determination pursuant to 28 U.S.C. § 1292 (b), arguing that the "protest requirement" was plainly wrong and that after preliminary discovery, it appeared that the potential class of women who had lost their employment because of the no-marriage rule was far in excess of that needed to meet the numerosity requirement of Federal Rule of Civil Procedure 23. Permission to appeal, however, was denied by the court of appeals.

In accordance with the invitation to intervene extended by the district court to "all former stewardesses who resigned or who were terminated because of United's said [no-marriage] policy between July 2, 1965 and November 7, 1968, and who thereafter protested the no-marriage policy or termination," 6 FEP Cases at 157, a number of former stewardesses intervened as co-plaintiffs. Relief as appropriate was fashioned for the original and intervening plaintiffs, and a final decision was entered on October 3, 1975. However, the original and intervening plaintiffs in-

licated that they would not appeal from the final decision and bring up for review the adverse class determination. Respondent Liane Buix McDonald then sought to intervene to appeal the class order which had excluded her and other "non-protesting" women who had resigned or were terminated under the rule from a remedy for petitioner's unlawful employment practice.

The district court denied intervention as untimely, and the Seventh Circuit reversed. *Romasanta v. United Air Lines, Inc.*, 537 F.2d 915 (1976). The court of appeals held that intervention to appeal the class ruling had been timely. *Id.* at 917. Turning to the merits, the Seventh Circuit held that the district court had erred in imposing its protest requirement and that the case should have been allowed to proceed as a class action. *Id.* at 918-20.

United acquiesced in the disposition of the class issues, limiting its petition for writ of certiorari, O.T. 1976, No. 76-545, to the propriety of intervention after judgment. Certiorari was granted, and the Court affirmed the decision of the court of appeals on the timeliness of intervention after judgment. *United Air Lines, Inc. v. McDonald*, 432 U.S. 385 (1977). In the course of its decision, the Court acknowledged that "United's petition for certiorari did not seek review of the determination that its no-marriage rule violated Title VII nor did it contest the merits of the Court of Appeals' decision on the class certification issue." *Id.* at 391.

Following remand, the district court in January, 1978 ordered that the case should proceed as a class action on behalf of the same class, absent the protest requirement, as it had originally defined in 1972. See 6 FEP Cases at 157. Thus, the class as certified was to consist of all women who "resigned or were terminated" because of United's no-marriage rule after July 2, 1965 (the date Title VII

went into effect) and November 8, 1968 (the date United abandoned the rule). However, in March, 1978 on United's motion to reconsider, the district court narrowed the class to exclude women who had involuntarily resigned in anticipation of marriage as required by the no-marriage rule. Both parties sought interlocutory review of the class definition, plaintiff challenging exclusion of constructive discharges and United claiming the temporal limits of the class were overinclusive. Permission to appeal was granted as to both issues by the court of appeals pursuant to 28 U.S.C. § 1292(b).

On appeal, the Seventh Circuit rejected United's attempt to distinguish between women who had been discharged because of the no-marriage rule and women whose resignations had been required by the express terms of the rule. 587 F.2d at 357, 360 (1978); Pet. App. A7-8. In this, the court stated (*Id.* at 360) that it was doing no more than reaffirm what it had decided two years previously in *Romasanta v. United Air Lines, Inc.*, 537 F.2d 915, the decision affirmed by this Court. 432 U.S. 385. On United's cross-appeal, the court of appeals accepted United's argument that it had not waived objections to the temporal limits of the class, rejected plaintiff's argument that the dates set by the district court in 1972 were res judicata, and held that the starting point of the class would be determined by the filing of the first EEOC charge by any of the class member plaintiffs. 584 F.2d at 361; Pet. App. A.8. United's petition for rehearing and a suggestion that the cause be reheard en banc were denied without opinion and without a vote.

REASONS FOR DENYING THE WRIT

The class definition, as has finally emerged after almost a decade of litigation, does not involve any issue worthy of this Court's attention. The claimed conflict among the circuits is illusory, and the decision of the court of appeals in this case is fully in consonance with prior decisions of this Court and other circuits. Also, the petition is presented on the basis of a misleading factual presentation, which should not be accepted as a basis for granting review.

I.

There is no merit to petitioner's argument (Pet. 8-15) that there is a conflict among the circuits on the question of whether the temporal limits of a class in a Title VII action are to be determined by the date of the filing of the first EEOC charge filed by a class member plaintiff. Here, that EEOC charge (filed by two intervening plaintiffs) was still pending at the time suit was filed and could have resulted in issuance of another "right to sue" letter and the filing of another class action in lieu of participation by intervention. Contrary to the petition (Pet. 9-10) respondent did not argue nor did the court below find that the statute was tolled by "*any* person" who had filed. (Italics in original.) Instead, respondent argued and the court below found the statute tolled by the EEOC filings of two co-plaintiffs, women who joined the suit while their timely EEOC charges were still pending. As petitioner appears to recognize (Pet. 9), if these two women—Terry Baker Van Horn and Mary Whitmore O'Connor—had not intervened in this action but instead had awaited the completion of EEOC proceedings and brought a second class action

following issuance of a "right to sue" letter, the starting date of the class would be 180 days before their charges had been filed, or July 29, 1965. Rather than await the conclusion of duplicative EEOC proceedings and initiation of duplicative litigation, those women intervened in this action at the invitation of the district court. 6 FEP Cases at 158. As the court of appeals correctly recognized (587 F.2d at 360, n.12, Pet. App. A.9), the starting date for the class can be no different with these women as co-plaintiffs than if they had filed their own class action. This unexceptional conclusion is based squarely on the principle settled by *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1974), and recognized by this Court in its prior opinion in this case, 432 U.S. at 389 n. 6, that the filing of a charge by a class member plaintiff satisfies the filing requirement for the class, a point petitioner conceded below and does not contest here.

United's claim of prejudice from this result is disingenuous. For example, when Terry Baker Van Horn filed her EEOC charge in January, 1966 she also filed a union grievance complaining about her termination because of the "no-marriage" rule. While the EEOC charge was held in abeyance, the union grievance was treated by United as a "test case" for the validity of the no-marriage rule. See *In re Van Horn*, 48 Lab. Arb. 727 (1967). There was no reason for United to believe that Ms. Van Horn would lose interest in her challenge under Title VII to the "no-marriage rule" after the arbitrator had declined to reach that issue, 48 Lab. Arb. at 733. (Of course she did not abandon the Title VII claim but rather became a co-plaintiff in this action.)

Neither *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3rd Cir. 1975), *Inda v. United Air Lines, Inc.*, 565 F.2d

554 (9th Cir. 1975),² nor the numerous district court cases cited by petitioner (Pet. 12) involve the question raised by petitioner and at issue below. On the contrary, these cases merely recite the settled rule which limits participation in class actions to absent class members who could still have timely filed themselves when the tolling charge was actually filed. This is precisely what the Seventh Circuit held here. Thus, after identifying the Van Horn and O'Connor charges as the tolling event it provisionally limited the class to those terminated within ninety days of their filing. 587 F.2d at 361 n.10; Pet. App. A.9.³

² The court of appeals properly distinguished *Inda v. United Air Lines, supra*. In that case, United had made a convincing case that the EEOC filings of the two plaintiffs were untimely and therefore defective. To overcome this potential defect in their individual cases, the plaintiffs in *Inda* sought to rely on EEOC charges which had resulted in other litigation to establish their right to sue under Title VII. This the Ninth Circuit refused to allow. 565 F.2d at 558. In this case, however, it is undisputed that the two original co-plaintiffs, Romasanta and Altman, had gone through the entire EEOC procedure and that the suit satisfied all of the jurisdictional prerequisites of Title VII. The Seventh Circuit therefore distinguished *Inda* as a case in which the sole plaintiffs sought to establish their right to sue on the basis of EEOC charges which had already resulted in litigation brought by others in another forum. 587 F.2d at 361 n.9; Pet. App. A.8 n.9.

³ If the petition for writ of certiorari should be granted, however, respondent would argue that petitioner has long ago waived any right to complain of the temporal limits set by the district court in 1972, i.e., July 2, 1965 to November 8, 1968, and not thereafter challenged. The court of appeals rejected this contention on the ground that the time limits of Title VII are jurisdictional and may not be waived. 587 F.2d at 360-61; Pet. App. A.8-9. Respondent has not cross-petitioned from this portion of the decision of the court of appeals because such review would be premature in light of the provisional nature of the ruling of the court below, 587 F.2d at 361 n.10; Pet. App. A.9, n.10. She would, of course, raise this as an alternate ground for affirmance, however, if the instant petition is granted.

II.

Petitioner would also have the Court review the direction of the court below that the relief should be provided to all similarly situated women injured by the policy, a result that is consistent with the policies of Title VII and the history of this case to date. Petitioner repeats arguments that the court of appeals aptly described as "pettifogging about the prior pleadings," 584 F.2d at 359, Pet. App. A.6, in arguing here that the class should not include constructive discharges, i.e., women who involuntarily resigned because of marriage as required by the "no-marriage rule," but should be limited to women who were discharged after refusing to comply with the rule and resign. (Pet. 15-20.) (The "no-marriage rule" prohibited the retention of a stewardess on marriage.) As shown in Part III below, this argument is based on a seriously misleading recitation of a 10-year long record. On the actual facts of the case, the court below was clearly correct in concluding that there was no basis for distinguishing between women who incurred the identical injury proscribed by Title VII—the loss of employment by females but not males—whether these women had involuntarily resigned or were fired. 587 F.2d at 360; Pet. App. A.6.

In holding it error to exclude from the class women who had resigned involuntarily, the court of appeals found United's semantic arguments to be without significance. 587 F.2d at 359-60; Pet. App. A.7. As the court noted, at various times the different parties to this matter have had various interpretations of the class in mind. Also, the scope of the class was never clarified in any of the earlier phases in large part because class status was consistently denied. In fact, after conducting its own review of the lengthy record of this case, the court below found that contrary to United's arguments (raised again in its petition

in this Court, Pet. at 16-17), the inclusion of constructive discharges in the class comported not only with the early notions of the *Romasanta* plaintiffs, but was also consistent with United's position in the district court. It acknowledged in the district court that a "class, if appropriate, would include all former stewardesses who resigned or were terminated," 584 F.2d at 360, Pet. App. A.6-7. It was also consistent with United's own policy of encouraging stewardesses to resign rather than await firing. *Id.* The class mandated by the court of appeals is, in fact, exactly the same class adopted by the district court at United's suggestion in 1972 absent the illegal protest requirement. 584 F.2d 360; Pet. App. A.8.

Indeed, this identity of situation appears to have been acknowledged in related proceedings in this court. In its decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 554 (1977), this Court described the no-marriage rule as having the effect of forcing the resignation of a stewardess who married. It is too late in the day for petitioner to retract its characterization in *Evans* of a resignation compelled by the unlawful rule as having been "involuntary,"⁴ or to argue that involuntary resignees were not injured by the rule. Thus, as the court of appeals correctly concluded, the parties' own view of the case was consistent with the district court's duty to include involuntary resignees and so fashion a class coincident with those who were damaged. 584 F.2d at 360; Pet. App. A.8.

For at least seven years, petitioner has had notice of the fact that the class of women injured by the no-marriage rule who had not "protested" their loss of employment was far in excess of the 27 or 28 persons referred to in the

⁴ Brief of Petitioner, *United Air Lines, Inc. v. Evans*, O.T. 1976 No. 76-333, at 4.

original complaint. Given the representations of the original plaintiffs in the district court and in their unsuccessful petition for permission to appeal about numerosity, there is no room in this case for United to argue that it will be unfairly prejudiced if it is required to make whole all of the women who were injured by its unlawful no-marriage rule.

The decision below turns on the idiosyncrasies of a ten-year long record and raises no legal questions of unique or pressing importance. The court below itself acknowledged that it was doing nothing more than reaffirm what it had decided two years before (in the decision previously affirmed by this Court). Review of the decision below remanding relief for all who were injured by the no-marriage rule would not seem to involve any questions worthy of the Court's attention.

III.

The factual presentation which permeates the petition for writ of certiorari is so contrary to what occurred during the ten years of this litigation that respondent is obliged to review the record lest the Court consider granting review on a state of facts which does not exist. The theme which underlies the petition for writ of certiorari is that the original plaintiffs did not seek to represent all persons who had been injured by the "no-marriage rule," i.e., that the original plaintiffs only sought to represent women who had been fired or involuntarily resigned and who had "protested" the no-marriage rule. (Pet. 10, 17, 19, 20). This is plainly contrary to the record in this matter.

First (contra, Pet. 17), the original plaintiffs plainly sought to represent all women who had lost their employment because of the no-marriage rule. As the original plaintiffs stated in their objections to defendant's pro-

posed order striking class actions, filed in the district court on September 12, 1972:

"It may be that in certain cases of resignation, in contrast to formal discharge, evidence that an individual protested her job termination may be relevant to prove that she was terminated involuntarily. However, once it is shown that an individual's employment was *involuntarily* termination because of the no-marriage rule, that individual should be deemed an eligible member of the class entitled to relief in this action whether or not she made a protest." (emphasis in original)

This is flatly at odds with petitioner's representation (Pet. 17) that "the named plaintiffs never asked the trial court to include in the class those flight attendants who had resigned without protest."

Second (contra, Pet. 16), it is more than "slightly misleading," 432 U.S. at 385 n.14, for petitioner to represent that the original plaintiffs proposed the two subclasses set out in the petition at 4 and 16. These two subclasses were proposed in another case, *Sprogis v. United Air Lines*, on remand from 444 F.2d 1194 (7th Cir. 1971), in an attempt to have that case converted into a class action. That the source of the two sub-classes is another case—is made clear in the petition for permission to appeal (Appendix, No. 76-545, at 62-73), which is incompletely quoted in the Petition for Writ of Certiorari at 4 and 16.⁵

⁵ Thus, the introduction to the subclass definition omitted from the material quoted by petitioner (Pet. at 4, 16) as "evidence" of original plaintiffs' position in this case—states that the submission was made in *Sprogis* after the Seventh Circuit's remand in that case, when "the Plaintiff in *Sprogis*, on February 5, 1972, filed a memorandum on the scope of the class entitled to relief." Pet. for Per. to Appeal, reprinted in App. No. 76-545 at 63. This memorandum was submitted by *Sprogis* in support of her motion for class treatment for this class. The motion was denied. *Sprogis v. United Air Lines*, 56 F.R.D. 420 (N.D. Ill. 1972).

Third, (contra, Pet. 17), petitioner misrepresents what was "confirmed in a statement of record" by counsel for the original plaintiffs. Rather than disavowing representation of stewardesses who had resigned (Pet. at 17), counsel for the original plaintiffs stated that he had sought relief for "stewardesses who resigned against their will because of marriage" as in another portion of the "statement of record" (actually a letter) selectively quoted by petitioner (Pet. at 17).

CONCLUSION

It is respectfully submitted that certiorari should be denied.

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